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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 788

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN
LASHER, PEARL LASHER, E. FRANK O'HARA,
SAMUEL BLOOM, ABRAHAM LINDNER, ELLA
LINDNER, SUNNE MILLER, GENIA BERK,
CHARLES GILBERT, DOROTHY LEE, HARVEY
LEE, HOWARD N. STACK AND MAX W. WINN,

Petitioners,

vs.

UNITED STATES DISTRIBUTING CORPORATION,
THE PITTSTON COMPANY, ET ALS.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF VIRGINIA AND
BRIEF IN SUPPORT THEREOF.**

JOHN J. WICKER, JR.,
GEORGE M. JAFFIN,
CHARLES WINKELMAN,
SEYMOUR M. HEILBRON,
Counsel for Petitioners.



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Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF VIRGINIA**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States of America:*

Your petitioners, Maurice D. Adams, Sylvia Jacobs,
Martin Lasher, Pearl Lasher, E. Frank O'Hara, Samuel
Bloom, Abraham Lindner, Ella Lindner, Sunne Miller, Genia
Berk, Charles Gilbert, Dorothy Lee, Harvey Lee, Howard
N. Stack and Max W. Winn, are citizens of the United States,
residing in various States, and are dissenting preferred

NOTE: Italics or other type-emphasis is supplied in this petition.

stockholders of United States Distributing Corporation (hereinafter called "Distributing"), a Virginia corporation chartered and organized in 1919 which was liquidated and ceased to exist pursuant to a merger forced through by The Pittston Company (hereinafter called "Pittston"), a Delaware corporation which was the dominant majority stockholder, and which acquired all of the assets of your petitioners' corporation by said merger. Your petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of Virginia—which is the Court of last resort in the State of Virginia—in the above-entitled case, which was heard by that Court on an appeal from a final judgment of the Law and Equity Court of the City of Richmond, Virginia. Said decision construed the Virginia Merger Statute (Virginia Code 1919, Section 3822, as amended by Chapter 380 of the Acts of 1922) and held that said amended statute as amended in 1922, afforded an appraisal for the "fair cash value" of their stock as the sole and exclusive remedy of dissenting preferred stockholders in case of merger.

The original Virginia Merger Statute, in force at the time your petitioners' corporation was chartered and organized in 1919, had been construed by the Supreme Court of Appeals of Virginia as being non-exclusive. (*Winfree v. Riverside*, 113 Va. 717, 75 S. E. 309.) The present decision, which your petitioners here complain of, likewise recognized the fact that under the original Virginia Merger Statute dissenting preferred stockholders like your petitioners had the option of pursuing statutory appraisal proceedings or invoking the aid of equity for the full enforcement of their contractual rights (R. 119). Said decision held that while the statutory appraisal remedy had not been exclusive in its original form, it became exclusive by the amendment of 1922 (R. 121). Said decision held that

the amended statute (said amendment having been enacted in 1922, three years after your petitioners' corporation was chartered and organized and began business under the laws of Virginia) had the effect of destroying the pre-existing equitable right of dissenting preferred stockholders, in merger cases, to invoke the aid of equity for the enforcement of their contractual rights (R. 127).

Opinions Below

The Law and Equity Court of the City of Richmond failed to hand down a written opinion. The opinion of the Supreme Court of Appeals of Virginia is officially reported in 34 Southeastern, 2nd Series, at pages 244-252. Duly certified copy of said opinion is included in the Transcript of Record filed herewith (R. 114-127). Petition for rehearing in the Supreme Court of Appeals of Virginia was denied by that Court on September 4th, 1945 (R. 167).

Jurisdiction

The final judgment for the Supreme Court of Appeals of Virginia was entered on September 4th, 1945. By order entered on the 27th day of November, 1945, the Chief Justice of this Court granted an extension until the 31st day of January, 1946, within which to file this application for writ of certiorari (R. 168). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the Virginia Merger Statute (Virginia Code, 1919, Section 3822, as amended by Acts 1922, Chapter 380—Now Section 3822, Virginia Code (Michie) 1942) as construed by the Supreme Court of Appeals of Virginia in this case, destroyed a vested contractual right of petitioners in contravention of the provisions of Article 1, Section 10 of the United States Constitution.

Question Presented

Whether a State Merger Statute which, at the time a corporation was chartered and organized in that State, afforded to minority dissenting preferred stockholders an appraisal proceeding for the "fair cash value" of their stock (alleged to be \$55 per share) as a cumulative optional remedy, in addition to the pre-existing equitable remedy for the enforcement of their contractual rights (\$184 per share, this being par value plus accrued unpaid dividends), could be lawfully amended some years thereafter so as to make the appraisal remedy exclusive and thereby destroy the *vested contractual rights* of minority dissenting preferred stockholders.

This question raises the point as to the constitutional validity of a State statute which would permit a majority stockholder to impair and depress the value of investments owned by investors scattered throughout the United States, in violation of the terms of the stock contract between the holders of said investments and the corporation which issued the stock certificates evidencing said investments.

The Stage in the Proceeding in the Courts Below at Which and the Manner in Which the Constitutional Question Was First Raised.

In the original Bill of Complaint (R. 72-85) filed by petitioners in the Law and Equity Court of the City of Richmond, the court of first instance, petitioners repeatedly alleged that the suit of petitioners was based on their contractual rights, fixed and vested, and that such rights had been impaired and violated. This issue was raised and emphasized in Sections 12, 20, 23, 25, 30, 33 and 35 of said original Bill of Complaint.

For example, in Section 12 of the Bill (R. 76) petitioners asserted:

“By virtue of their contractual rights as preferred stockholders * * * your complainants * * * were entitled to receive * * * not less than \$184 per share. * * * This right was and is a contractual right, fixed and vested.”

The question was again raised in the Supreme Court of Appeals of Virginia. The entire petition (R. 1-71) was devoted to a statement of facts, the assignments of error and a discussion of the decisions of that and other courts relating to similar contractual vested rights. Thus, in said petition for appeal (R. 7) in paragraph (3), under the heading “The Position of Appellants,” petitioners asserted that

“This was a vested contractual right which no merger—consummated without appellants’ consent—could destroy or impair.”

Further on in the Appendix to the Appeal Petition (R. 62) petitioners asserted that the

“Appraisal Statute would be unconstitutional if construed as exclusive.”

Petitioners cited and quoted from *Clearwater v. Meredith*, 1 Wall. 25 at 39, and *Craddock-Terry v. Powell*, 181 Va. 441, 25 S. E. (2nd) 365 at 373 in support of this contention as to unconstitutionality (R. 62-63).

On page 63, petitioners quoted the following from the *Craddock-Terry* decision, *supra*:

“The Legislature, in the exercise of this power, has no right to enact a law which impairs vested contractual rights.”

In its opinion in this case the Supreme Court of Appeals of Virginia recognized and passed upon this point (R. 125) when the opinion said:

“The appellants argue that the effect of the merger and the application of the terms of the appraisal statute is to violate the contract which they had with the corporation as embodied in its charter and in the provisions of the certificates of stock held by them.”

When the Supreme Court of Appeals of Virginia reversed the trial court, overruled petitioners' said contention, dismissed petitioners' suit and held that the Virginia Merger Statute was exclusive and consequently prohibited petitioners from seeking enforcement of their contractual rights, petitioners again raised the Federal question in their “Petition for Re-hearing” (R. 129-166).

Petitioners' Petition for Re-hearing cited Article I, Section 10 of the United States Constitution (R. 131) and among other things pointed out the following:

“*Outline of Grounds for Re-hearing.* Your Petitioners are advised and believe and therefore represent that the decision of your honorable Court is erroneous and should be re-heard, vacated and revised because:

* * * (2) Your decision, in effect, impairs the obligation of contract between your petitioners and ‘Distributing,’ as expressed in the charter and on the stock certificates of said corporation, and thus deprives petitioners of their constitutional rights.” (R. 136)

“*The Constitution of the United States expressly prohibits the enactment of any law impairing the obligation of contracts. Your decision in the case at bar, if adhered to, would violate the constitutional rights of petitioners in that it would, in effect, impair the obligations of the contract between petitioners and their corporation, and would substitute in place of contractual agreement of the parties (par plus accrued dividends) something entirely different (“fair cash value”).* (R. 144)

This was the first time in the proceedings that petitioners were confronted with a situation where there was any cause, reason or excuse for specifically and expressly asserting that the statute was repugnant to Article I, Section 10, of the Constitution (*Saunders v. Shaw*, 244 U. S. 317, 37 S. Ct. 638; "Jurisdiction of the Supreme Court of the United States" by Robertson and Kirkham, Sec. 71, page 120).

The manner in which the validity of the Virginia Statute (Code Section 3822) was raised in the courts below comes squarely within the principle laid down by this Court in the case of *People of State of New York v. Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, in which Mr. Justice Van Devanter, speaking for this Court, said, at page 67:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intentment that this was done, the claim is to be regarded as having been adequately presented."

State Statutes Involved

The Virginia Merger Statute, the validity of which is involved, is Virginia Code Section 3822 (Acts of General Assembly of Virginia, Ex. Sess. 1902-3-4, Chap. 270, p. 437, at pp. 476-479; Chap. V, Sec. 41; as amended, Acts of 1922, Chap. 380, p. 625, at pp. 632-634). The pertinent portion of such statute is reproduced at the end of a printed booklet entitled "Proxy Statement and Agreement of Merger," which was introduced in evidence in this case, and which has been certified as a part of the transcript of record filed herewith (R. 169 *et seq.*). Substantially, the statute provides that any non-assenting stockholder may obtain an

appraisal of the "fair cash value" of his stock upon application to one of the courts named in the statute provided he has given to the merged corporation notice of dissatisfaction within three months after the merger, and provided further that no settlement had been agreed upon with the corporation within 30 days after the expiration of the first three months period. The statute authorizes the appraisers appointed by the court to conduct complete investigations within and without the state, to subpoena witnesses and necessary records, and to return with their appraisal all evidence produced before them. The court is authorized to enter judgment upon the appraisal or to substitute the court's own figure if the court disapproves the appraisal determined by the appraisers. The statute further provides that any stockholder who fails to give written notice of dissent within said three months period shall thereafter be conclusively presumed to have assented to the merger and shall not thereafter have any rights whatever except those granted to assenting stockholders under the merger plan. However, the statute does not contain any language expressly or by necessary implication depriving dissenting stockholders of the pre-existing right to insist upon fulfillment of their contractual rights, as set forth in the corporation charter, rather than pursuing appraisal proceedings. The Supreme Court of Appeals of Virginia, however, in its recent decision, from which an appeal is here sought, has nevertheless construed the statute as destroying the said pre-existing contractual rights of dissenting stockholders such as petitioners.

In addition Virginia Code Section 3792 of the General Corporation Law of Virginia has a bearing in this case, inasmuch as it expressly provides that it shall apply to all Virginia corporations and it expressly prohibits any corporation from changing the priority of any stockholder, as

to assets or dividends, without the consent of at least 90% in interest of the class of stockholder affected. The pertinent parts of this statute are as follows:

“Every corporation shall have power to create two or more kinds of stock any of which may be stock with par value or stock without par value, of such classes, with such designations, preferences and voting powers, or restrictions or qualifications thereof, as shall be stated and expressed in the charter * * * or in any amendment thereof. * * * The holders of such preference stock shall be entitled to such rights upon the dissolution or any distribution of the assets of the corporation as may be expressed in the certificate of incorporation or any amendment thereof. * * *

“No corporation, whether heretofore or hereafter chartered, shall, without ninety per centum consent in interest of the class or classes of stock affected thereby, have the power to change the voting rights and/or the priority as to assets or dividends of any stockholder, or to change the amount or time at which any preferred stock is redeemable, or to issue any stock taking priority, either as to assets and/or dividends, over any preferred stock then issued and outstanding, and this ninety per centum requirement shall apply regardless of whether said stock so affected had theretofore the right to vote or not.”

It will be noted that the foregoing statute (last enacted in 1938 which was sixteen years subsequent to the amendment of the Virginia merger statute in 1922) is all inclusive in its terms and does not in any way indicate or permit any exception in case of merger. The record in this case shows that consent to the merger was given by the holders of only 89.11% of the preferred stock outstanding, which obviously was less than the 90% minimum required by Virginia Code Section 3792 (R. 105).

Statement .

United States Distributing Corporation was a holding corporation chartered in Virginia in 1919, with total assets of over seventeen million dollars, but with its real offices and all of its officers and directors in New York or elsewhere outside of Virginia. At the time of the merger it had outstanding 99,915½ shares of 7% cumulative preferred stock of a par value of \$100 per share. 62,879 shares of this preferred stock was held by The Pittston Company, a Delaware corporation (R. 98, par. 13). Petitioners own 1187 shares of said preferred stock (R. 73).

By contract between your petitioners and Distributing, as expressed in the corporate charter and in the certificates of stock issued to your petitioners, your petitioners were entitled, in case of liquidation or dissolution or distribution of the assets of Distributing, to receive out of such assets the par value (\$100 per share) of their stock plus all accrued accumulated unpaid dividends. The exact language of the charter contract and the stock certificates is as follows (R. 74):

“In case of the liquidation or dissolution of this corporation, or a distribution of its assets, except by payment of dividends, the assets of this corporation shall first be applied toward paying to the holders of the preferred stock an amount equal to the par value of their respective holdings of such preferred stock plus all accrued and unpaid dividends thereon. * * * ”

Over the dissent and protest of your petitioners, Pittston, being the dominant majority stockholder, effected a merger of Distributing and Pittston. As a result of this merger Distributing was swept out of existence, dissolved and liquidated, and all of its assets were acquired by Pittston. At the time of the merger the accumulated unpaid dividends on the stock held by petitioners amounted to \$84.00 per

share. Your petitioners own in the aggregate 1187 shares and consequently were entitled to be paid a total of \$218,400.00 for their holdings out of the assets of their corporation.

When the merger was consummated, the officers of Pittston and Distributing were practically identical; and the Board of Directors were identically the same, with the exception of one separate and different Director on the Board of each corporation. The President and the majority of these officers and directors had none of their own money invested in Distributing. Distributing was thoroughly solvent and comparatively successful. By contrast, Pittston had no net income whatever for several years (1939, 1940, 1941) preceding the merger (R. 33-34).

As a result of the merger, and the decision of the Supreme Court of Appeals of Virginia, petitioners are required to surrender their stock for the "fair cash value," which Pittston alleges is only \$55.00 per share; although Distributing's assets admittedly were far more than sufficient to pay all dissenting stockholders the full par value plus accrued unpaid dividends (R. 21, last paragraph). On this basis the aggregate loss to petitioners between the value guaranteed by contract and fixed by the terms of the merger is \$153,123.00.

This suit was brought in the Law and Equity Court of the City of Richmond by petitioners, as minority dissenting preferred stockholders of Distributing, to invoke the aid of a court of equity in the enforcement of their vested contractual rights, viz. the payment of par value plus accrued unpaid dividends out of Distributing's admittedly ample assets. By decree entered on September 5, 1944 (R. 107), the trial court recognized the right of petitioners, as dissenting preferred stockholders, to the aid of equity in the enforcement of these contractual rights, but re-

ferred the case to a Commissioner to determine whether the assets were sufficient to make full payment upon all preferred stock outstanding at the time of merger, including that held by assenting stockholders as well as that held by dissenting stockholders.

On appeal to the Supreme Court of Appeals of Virginia from said decree entered by the trial court, the following assignments of error (among others) were made (R. 9):

That the Law and Equity Court of the City of Richmond committed material and reversible error in its decree of September 5th, 1944, as follows:

“(1) In declining to hold * * * :

(a) that the distribution of assets to common stockholders estopped Pittston from claiming that the assets were insufficient for full satisfaction of contractual rights of appellants and other dissenting preferred stockholders; and

(b) that the appellants should be paid the full contractual value of their stock (\$184 per share plus interest) since the admitted value of the net assets were more than sufficient to pay this full value to appellants and all other dissenting preferred stockholders;
* * * ,”

The Supreme Court of Appeals of Virginia refused to correct the decree of the lower court, but dismissed the bill of complaint originally filed; without prejudice, however, to petitioners “to pursue, in the proper court, their remedy for the fair cash value of their stock” rather than recover the par value plus accrued cumulative dividends, as petitioners are entitled to recover, under their vested contractual rights.

Specification of Error to Be Urged

The Supreme Court of Appeals of Virginia erred:

(1) In dismissing petitioners’ original Bill of Complaint.

(2) In holding that the Virginia merger statute (Virginia Code, Section 3822—as amended in 1922, which was three years after petitioners' corporation was chartered and organized in 1922—) was valid, although said amended statute as construed by the court, not only impaired but actually destroyed the obligation of the contract whereby petitioners were entitled to demand and receive out of the assets of their corporation—upon its liquidation or dissolution or distribution of its assets—the par value of their preferred stock plus accrued cumulative dividends thereon; said statute as so construed being repugnant to Article I, Section 10 of the Constitution of the United States.

(3) In overruling petitioners' contention that said statute, if construed as an exclusive remedy for the enforcement of petitioners' rights, would destroy petitioners' vested contractual rights and consequently would be repugnant to Article I, Section 10, of the Constitution of the United States.

(4) In failing to hold that the continuing corporation, Pittston, be required to pay to petitioners out of the assets it received from Distributing the par value of petitioners' stock, plus accrued dividends thereon, since Pittston acquired in the merger with Distributing assets which Pittston admitted were far more than sufficient for such purpose.

Reason for Granting the Writ

The Amended Virginia Merger Statute as construed by the Supreme Court of Appeals of Virginia,—

(1) Permits the destruction of petitioners' vested property rights in accumulated accrued dividends, which at the time of the merger amounted to \$84.00 per share, by a dominant majority stockholder—in violation of your petitioners' constitutional rights.

(2) Impairs the obligation of the contract between petitioners' and Distributing as expressed in its charter, and thus deprives petitioners of their constitutional rights as guaranteed by Article I, Section 10, of the Constitution of the United States.

(3) Undermines the stability of investments, based upon express contract provisions relating to the redeemable value thereof, even though sufficient assets are available for such purpose; thus having a depressing effect upon the investment markets.

In spite of the position heretofore adhered to by the Supreme Court of Appeals of Virginia, that Court has now handed down its decision in the instant case, completely ignoring and disregarding petitioners' vested contractual rights, although the record from its inception reveals that this constitutional point was relied upon by your petitioners in each of the Courts below.

This decision, we maintain is contrary to the principle laid down by this Court. *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN
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January 28, 1946.



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UNITED STATES DISTRIBUTING CORPORATION,
THE PITTSTON COMPANY, ET ALs.,

Respondents

**BRIEF SUPPORTING PETITION FOR WRIT OF
CERTIORARI**

This is an application for a writ of certiorari to review the action of the Supreme Court of Appeals of Virginia—the Court of last resort in that State—in holding that the Virginia Merger Statute (Virginia Code Section 3822), as

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amended, is valid, and that the statutory appraisal remedy therein provided constitutes the sole and exclusive remedy of the petitioners, as minority dissenting preferred stockholders, and that the amended act, by implication, had destroyed the acknowledged pre-existing equitable rights of such stockholders to invoke the aid of equity for the enforcement of their contractual rights as such.

Petitioners' corporation was chartered and organized in Virginia in 1919, while the amended Act was not adopted until three years thereafter, to-wit in 1922.

Statement of Facts

Petitioners are the holders of 1,187 shares of 7% cumulative preferred stock of United States Distributing Corporation (hereinafter called "Distributing") a Virginia corporation chartered and organized in 1919. This stock had a par value of \$100 per share. At the time of merger (December 31, 1942) accumulated unpaid dividends amounted to \$84 per share. Consequently the total claim of petitioners—for par value plus accrued dividends—aggregated \$218,408.00, plus interest.

Their contract with Distributing, as set forth in their stock certificates, assured them of payment of par value plus accrued dividends in case of "dissolution" or "liquidation" or "distribution of assets."

At the time their corporation, Distributing, was chartered and organized in 1919, the "settled law" in Virginia gave dissenting stockholders in case of merger their own choice of two independent optional remedies, to-wit: (1) invoking the aid of equity to enforce their contractual rights; or (2) obtaining a judgment for the appraised "fair cash value" of their stock. This was so held by the Supreme Court of Appeals of Virginia in 1912 in the case of *Winfree*

v. *Riverside*, 113 Va. 717, 75 S. E. 309, in which the Virginia Court said:

"While this summary remedy is given by the statute and the appellant might have pursued it, he was not bound to do so.

"Although the consolidating statute took away from him the right to defeat the consolidation by refusing to assent to it, it did not take away from him the right to refuse to surrender his stock for stock in the new corporation, or to refuse to take anything for it less than its actual value at the date of the consolidation. *Barnett v. Philadelphia Market Co.*, 218 Pa. St. 649, 67 Atl. 912; *Colgate v. U. S. Leather Co.*, 67 Atl. 657, 5 *Thomp. on Corp.*, sec. 6060.

"To ascertain that value, under the allegations of the bill, investigations into the condition of the Riverside Cotton Mills may have to be made, and accounts taken, which could be much better done in a court of equity than in a court of law.

"The demurrer to the bill, on the ground that the appellant had a complete and adequate remedy at law, was therefore properly overruled. *Hickman v. Stout*, 2 Leigh (29 Va.) 6; *Taylor v. Nelson*, 14 Gratt. (55 Va.) 214; *Coffman v. Sangster*, 21 Gratt. (62 Va.) 263; *Nat. Life Assurance etc. v. Hopkins, Admr.*, 97 Va. 167, 33 S. E. 539."

This holding was quoted with approval by the Virginia Court as late as 1943 in *Craddock-Terry v. Powell*, 181 Va. 437, 25 S. E. (2nd) 363.

At 25 S. E. (2nd) 374, in the *Craddock-Terry* case, the Virginia Court said as follows:

"It is settled by the decisions of this Court that the existence of a summary remedy of appraisal and payment under the sales statute does not make the remedy at law adequate in such manner as to defeat equity jurisdiction, and that the existence of such remedy does not otherwise foreclose the plenary jurisdiction of a

court of equity to grant an injunction in advance of action or to grant a money award on equitable principles after action." (Citing *Winfree v. Riverside*, *supra*)

Although the *Craddock-Terry* case involved the sale of all assets, while the case at bar involved a merger, nevertheless both cases involved principally the rights of minority dissenting preferred stockholders. The Virginia Court recognized the fact that the same principles governed both cases, since the principal decision on which the Court relied in the *Craddock-Terry* case was *Winfree v. Riverside*, *supra*, which was a merger case.

In 1922—three years after petitioners' corporation, Distributing, was chartered and organized—the Virginia Merger Statute was amended to give the appraisers broader powers and to enable the merging corporation as well as dissenting stockholders to institute appraisal proceedings.

There was nothing in the 1922 amendment which either expressly or impliedly demonstrated any legislative intent to abolish the pre-existing equitable remedy of enforcement of stock contracts. Up until the decision of the Supreme Court of Appeals of Virginia in the case at bar it was universally thought that this pre-existing equitable remedy of minority dissenting stockholders remained unimpaired, just as it had been with the original merger statute. In 1943, The United States District Court for the Southern District of New York in the case of *Weiss v. Atkins*, 52 Fed. Sup. 418 (reversed on appeal *on other grounds*. . . *Routh v. Weiss*, 149 Fed. (2nd) 193) so held in a suit brought by common stockholders against Distributing's directors for destruction of their investment by this very merger.

All recognized textwriters and secondary authorities classified Virginia as one of the jurisdictions where the appraisal remedy in merger cases was merely cumulative

and not exclusive. (Fletcher on "Corporations," Vol. 15, Sec. 7165, page 242; Thompson on "Corporations," 3rd, Ed., Vol. 8, Sec. 6035, page 101; American Jurisprudence, "Corporations," Vol. 13, Sec. 1230, page 1120; Corpus Juris Secundum, "Corporations." Vol. 19, page 1376, note 53).

The dominant majority stockholder of Distributing was The Pittston Company, a Delaware holding corporation, which owned over 80% of Distributing's common stock and over 60% of Distributing's preferred stock. By means of this dominating majority control (since the Virginia Merger Statute required approval of only a majority of stock interest to effect a merger) Pittston forced through a merger as of December 31, 1942. By means of this merger, Pittston acquired all of Distributing's assets and franchises of every description, and Distributing was "completely liquidated," its assets "distributed" and Distributing thereupon "ceased to exist." (The terms quoted in the preceding sentence are taken verbatim from the "Agreement of Merger" Appendix. Furthermore, pursuant to the terms of the merger some of the assets, albeit a minor portion, were distributed to Distributing's common stockholders. All of this was done over the protest and in spite of the expressed dissent of petitioners and other dissenting stockholders. Within slightly more than four months after the merger, petitioners brought a suit in equity to enforce their contractual rights.

The trial court (Law and Equity Court of the City of Richmond) held that the amended statute was non-exclusive and merely cumulative. However, the Supreme Court of Appeals of Virginia in the case at bar has held (and affirmed its holding by denying petition for re-hearing) that the 1922 amendment had the effect of making the statutory remedy exclusive and abolishing the pre-existing equitable remedy. Since it is the Court of last resort in Virginia,

its holding is conclusive in Virginia. Consequently, we must assume, for the sake of this petition for writ of certiorari, that the 1922 amendment deprived stockholders of Distributing of certain rights (i. e., equitable enforcement of stock contracts) which admittedly existed under the laws of Virginia when Distributing was chartered in 1919.

The contractual rights thus impaired by the amendment of 1922 were substantial. As the law stood prior to the 1922 amendment, dissenting preferred stockholders, like petitioners, were entitled to equitable enforcement of their stock contract, viz. the application of corporate assets to the payment of par value plus accrued dividends. In the case at bar this amounted to a total of \$184 per share as of the merger date (December 31, 1942). If limited to appraisal value for the "fair cash value" the amount is alleged by Pittston to be only \$55 per share. Obviously this is less than one-third of the amount to which petitioners' stock contract entitled them, since it was conceded of record that the corporate assets at the time of merger was far more than sufficient to pay the full contractual value to petitioners and all other dissenting stockholders (R. 105, par. 43).

Furthermore, the pre-existing equitable remedy assured dissenting stockholders of actual payment wherever—as in this case—the assets were sufficient; whereas the statutory appraisal remedy provided merely a judgment collectible as other judgments at law. The importance of this point is accentuated by the fact that all of the assets were outside Virginia, consequently making collection of ordinary judgment at law all the more difficult and uncertain.

State Statutes Involved

The State statute, the validity of which is involved, is the Virginia Merger Statute which is Virginia Code Section

3822 (Acts of General Assembly of Virginia, Ex. Sess. 1902-3-4, Capt. 270, p. 437, at pp. 476-479; Chap. V, Sec. 41; as amended, Acts of 1922, Chap. 380, p. 625, at pp. 632-634). The pertinent portion of such statute is reproduced at the end of a printed booklet entitled "Proxy Statement and Agreement of Merger," which was introduced in evidence in this case and which has been certified as a part of the transcript of record filed herewith Appendix.

In addition Virginia Code Section 3792 of the General Corporation Law of Virginia has a bearing in this case inasmuch as it expressly provides that it shall apply to all Virginia corporations and it expressly prohibits any corporation from changing the priority of any stockholder, as to assets or dividends, without the consent of at least 90% in interest of the class of stockholders affected.

The pertinent parts of these statutes are quoted or summarized in the accompanying petition for writ of certiorari.

Assignments of Error

The Supreme Court of Appeals of Virginia erred:

- (1) In dismissing petitioners' original Bill of Complaint.
- (2) In holding that the Virginia merger statute (Virginia Code Section 3822—as amended in 1922, which was three years after petitioners' corporation was chartered and organized in 1919—) was valid, although said amended statute, as construed by the court, not only impaired but actually destroyed the obligation of the contract whereby petitioners were entitled to demand and receive out of the assets of their corporation—upon its liquidation or dissolution or distribution of its assets—the par value of their preferred stock plus accrued cumulative dividends thereon; said statute as so construed being repugnant to Article I, Section 10 of the Constitution of the United States.

(3) In overruling petitioners' contention that said statute, if construed as an exclusive remedy for the enforcement of petitioners' rights, would destroy petitioners' vested contractual rights and consequently would be repugnant to Article I, Section 10, of the Constitution of the United States.

(4) In failing to hold that the continuing corporation, Pittston, be required to pay to petitioners out of the assets it received from Distributing the par value of petitioners' stock, plus accrued dividends thereon, since Pittston acquired in the merger with Distributing assets which Pittston admitted were far more than sufficient for such purpose.

Summary of Argument

In our argument immediately following we stress the point that Section 3822 of the Code of Virginia, if construed to afford petitioners an exclusive remedy for the determination of their rights herein, is, to that extent unconstitutional, in that petitioners' vested contractual rights are impaired in clear violation of the provisions of Article I, Section 10 of the Constitution of the United States. *Coombes v. Getz*, 285 U. S. 434, 52 S. Ct. 435; *Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Company*, 300 U. S. 124; 57 S. Ct. 338; *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56; 55 S. Ct., 555; *Planters Bank v. Sharp*, 6 Howard 301, at 330; *Clearwater v. Meredith*, 1 Wallace 25, at 39; *McGahey v. Virginia*, 135 U. S. 662; 10 S. Ct. 972; *Curran v. Arkansas*, 15 Howard, 304, at 310; *Ward v. Krinsky*, 259 U. S. 503, 42 S. Ct. 529, 29 A. L. R. 1207.

Argument

In *Coombes v. Getz*, *supra*, goods were sold to a California corporation at a time when the Constitution of California made directors personally liable for corporate funds

embezzled or misappropriated by corporate officers during the terms of such directors. The seller's assignee brought suit against a corporation director to enforce this liability, alleging misappropriation and embezzlement by corporate officers. While the litigation was pending, the California constitutional provision was repealed and the suit dismissed. Plaintiff obtained a writ of certiorari, and this Court held that such repeal was repugnant to Article I, Section 10, of the Constitution. In defense it was contended that the contract when entered into was conditioned upon a constitutional reservation of the right to alter or repeal laws concerning corporation. Rejecting this contention, this Court, speaking through Mr. Justice Sutherland, said, at 285 U. S. page 441:

"The authority of a State under the so-called reserved power is wide, but is not unlimited. The corporate charter may be repealed or amended, and, within limits not necessary to define, the interrelations of State, corporation and stockholders may be changed; but neither vested property rights nor the obligations of contracts of third persons may be destroyed or impaired."

Holding that the contractual rights of the plaintiff (or his predecessor) had become fixed, this Court said, at page 448,

*"It is settled by decisions of this and other federal courts (citing cases) * * * that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Article I, Section 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution."*

In the case at bar, *petitioners had a right to rely upon the law of Virginia as it stood at the time their corporation was*

chartered and began business. They had a right to presume that any subsequent statutory amendment would not be applied retroactively to the impairment of contractual rights which had arisen and become vested prior to such amendment. Yet the effect of the decision in the case at bar is to give just such a retroactive effect to the 1922 amendment in utter disregard of the contractual relationship previously entered into between Distributing and its stockholders. As was said by the Supreme Court of Appeals of Virginia in the *Craddock-Terry* case, *supra*, at 25 S. E. 2nd, at page 373,

“The Legislature, in the exercise of this power has no right to enact a law which impairs vested contractual rights.” • • •

“If the provisions of these two statutes” (Section 3820 and Section 3822) “are construed to mean what the appellants” (i. e. the two corporations involved) “contend they mean” (i. e. that the statutory appraisal remedy is exclusive), “then the Legislature has empowered a two-thirds majority of stockholders in a solvent corporation to eliminate at will the contractual obligations, and what have been regarded heretofore as vested rights of preferred stockholders. To read this meaning into the statute raises a serious constitutional question” (Citing numerous cases).

Since the Virginia Court obviously believed that the Legislature had not conferred any such power upon a two-thirds majority in sales cases, and since the Virginia Court further obviously believed that any such statutory attempt would be unconstitutional, then, a fortiori, it must be concluded that any such attempt to confer any such power upon a mere majority would unquestionably be unconstitutional.

Again in *Craddock-Terry v. Powell*, *supra*, at page 370, the Virginia Court said:

“Manifestly, a contract between two corporations could not legally make terms which would be violative

of a contract between one of the corporations and its stockholders.”

In *Richmond v. Wachovia*, *supra*, it was held that a statute modifying a remedy for the enforcement of contractual rights was not unconstitutional *provided* the modification falls within “the boundary of permissible regulation of the remedy. * * *” In that case the right of a mortgagee purchaser at a mortgage sale was limited by subsequent statute to recovery of a deficiency judgment for the difference between the amount of the debt and the fair value of the mortgaged property. Speaking through Mr. Justice Roberts this Court said, at 300 U. S. page 140:

“The Act alters and modifies one of the existing remedies for realization of the value of the security but it cannot fairly be said to more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent him from obtaining more than his due.”

How utterly different the amended statute is in the case at bar! Here the statute—as interpreted by the Supreme Court of Appeals of Virginia in its recent decision—completely destroys all remedy for the enforcement of petitioners’ contractual rights and leaves merely an appraisal remedy by which—admittedly—petitioners cannot hope to obtain what this Court said, in the *Richmond v. Wachovia* decision, they had a right to viz: “payment in full” or the “full enforcement” of their contract.

In dollars and cents, the amended statute deprives petitioners of a right to enforce their contract for \$184 per share, and leaves them with nothing but the right to obtain something entirely different viz. “fair cash value” which the corporation maintains is only \$55 per share.

In *Worthen v. Kavanaugh*, *supra*, this Court held unconstitutional a state statute which so modified the remedy of enforcement of contractual rights as to substantially decrease their value. In that case, the State of Arkansas passed a law in 1933, amending the tax laws in such manner as to extend substantially the time within which taxes had to be paid and the period for redemption of property sold for taxes, and which substantially reduced the penalties on delinquent taxes. Holders of Arkansas Municipal Bonds, issued in 1930, attacked these amendments, and this court held the amended law to be an impairment of the obligation of contract. Through Mr. Justice Cardozo, this Court said at 295 U. S. page 60:

“To know the obligations of a contract we look to the laws in force at its making” (citing supporting decisions)” * * *

“With studied indifference to the interests of the mortgagee or his appropriate protection they” (the legislature) “have taken from the mortgage the quality of an acceptable investment for a rational investor.”

Even so, in the case at bar, the 1922 amendment of the Virginia Merger Statute, as now construed, has deprived petitioners' preferred stock “of the quality of an acceptable investment for a rational investor.”

Under the law formerly in effect, petitioners and other preferred stockholders had a right to expect “payment in full” of what their stock contract expressly promised, viz.: par value plus accrued dividends. The only condition was sufficiency of assets; and in the case at bar the record shows conclusively that the net assets at the merger were far greater than the total amount necessary to discharge the full contractual obligations to all stockholders entitled to demand the same. As was said by the Supreme Court of

Appeals of Virginia in the *Craddock-Terry* case, *supra*, at 25 S. E. (2nd) page 363:

“The common understanding of such contracts” (i.e. preferred stock) “is that the preferred stockholders take no risk either as to the return of par value on their stock, together with the limited dividends they are conditionally promised thereon, if the assets for distribution are sufficient to reimburse them * * *.”

In *Clearwater v. Meredith*, 1 Wall 25, this Court in dealing with the construction of a merger statute said at page 39:

“But in conferring the authority” (to merge by majority vote) “the Legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation.

“Even if the Legislature had manifested an obvious purpose to do so, the Act would have been illegal, for it would have impaired the obligation of the contract.”

In *Planters v. Sharp*, 6 Howard 301 at 310, this Court held that a statute would be unconstitutional if, by its operation, it resulted in decreasing the obligation of a valid contract, even though such decrease might be small. In the case at bar, we have an admittedly valid contract under which petitioners were entitled to \$184 per share, and were entitled to invoke the aid of equity to enforce their rights. Yet the amended statute—enacted three years *after* the corporation’s organization—as construed in the case at bar would greatly decrease the amount of petitioners’ recovery and, in addition, would deprive petitioners of any aid of a court of equity in obtaining their contract rights.

In *Ward v. Krinsky*, 259 U. S. 503, 42 S. Ct. Rep. 529, 28 A. L. R. 1207, it was held that this Court, while bound by the State Court’s construction of a statute, is not concluded

by its reasoning and should determine whether the statute, as construed, is repugnant to the Federal constitution.

In *McGahey v. Virginia*, 135 U. S. 662, 10 S. Ct. Rep. 972 this Court held that the obligation of contract is unconstitutionally impaired by any state law which materially abridges the remedy for enforcement existing at the time the contract was made, *unless the statute supplies an alternative remedy equally adequate and efficacious. In the case at bar, it is perfectly obvious that the alternative remedy supplied by the amended statute falls far short of meeting this test.* A statutory proceeding for an ordinary law judgment, in an amount claimed by the merging corporation to be only \$55 per share, substituted in place of an equitable remedy assuring full payment of contractual rights of \$184 per share, is neither "equally adequate" nor "equally efficacious."

In *Curran v. Arkansas*, 15 Howard 304, at 310, it was held that any statute which materially impairs the means of enforcing a contract, impairs the obligation thereof, and hence is unconstitutional. In our case, we have a statute, as amended and construed, which not only impairs but practically destroys the means of enforcing the contract between a corporation and its minority dissenting stockholders. *The appraisal remedy supplied by the amended statute made no provision whatsoever for any enforcement of the contract but only for substituting something entirely different in character and amount, to-wit—"fair cash value."*

This "fair cash value" has no relationship with that which the contract prescribed viz.—"par value plus accrued unpaid dividends." In some cases "fair cash value" might be far less than par value alone. The stock market is full of preferred stocks selling substantially below par value. On the other hand there are numerous stocks selling daily at

nearly double their par value. The only logical protection for minority stockholders is a choice, at their option in each case, between pursuing appraisal proceedings for "fair cash value" if that is higher, or insisting upon their contractual rights if the "fair cash value" has been depressed. (Usually this accretion or depression is largely controlled by dominant majority stockholding interests.)

In rejecting petitioners' argument that the merger appraisal statute, if exclusive, would violate petitioners' constitutional rights, the Virginia Supreme Court of Appeals in its decision-opinion (R. 125) based its rejection upon two points: (1) that appellants (petitioners) when they invested in the stock were presumed to know the possibility of merger and appraisal under the statute; and (2) that the merger did not work a dissolution and hence did not give stockholders any right to demand contractual enforcement.

As to the first point, the decision furnished complete refutation of its own argument in the following language:

"In the first place, it is elementary that the general corporation law of the State, *in force at the time of the incorporation*, is just as much a part of the contract between the corporation and its stockholders as are the documents on which appellants rely."

We have no quarrel with this principle but the Virginia Court overlooked and ignored the vital fact that *the law upon which it based its decision was not in force at the time of the incorporation (1919) and did not become effective until the amendment of 1922, three years thereafter!*

As to the second point, the Virginia Court overlooked the fact that the enforcement of petitioners' contractual rights was not dependent upon "dissolution" but became effective upon either "liquidation" or "distribution of assets." As pointed out in the original appeal petition

(R. 22-23; and R. 36) and in the Petition for Re-hearing (R. 158-161) no one could question the admitted fact that, pursuant to the express terms of the merger, Distributing has been "completely liquidated" and all of its assets "distributed" and has "ceased to exist."

This is not a case in which two corporations are merged into a new corporation. In this case one corporation, Distributing, was completely swallowed up by another corporation, Pittston (its dominant majority stockholder) and pursuant to the merger, was "buried with statutory honors." The situation was aptly set forth in *Rochester v. Rochester*, 205 U. S. 236, 27 S. Ct. Rep. 469. In that case this court held that a corporation without stockholders, without officers, without property and without the right lawfully to do business, is dissolved by operation of the law which brings this condition into existence.

Every one of the various specific conditions above, on which this Court based its decision in the *Rochester* case, existed as to Distributing after completion of the merger.

In some states, as in Virginia, there are statutes which authorize a corporation, under certain conditions, to reclassify their stock and alter preferences or priorities of respective classes of existing stock, and even to extinguish preference attaching to preferred stock. Such statutes, however, are almost uniformly construed to apply only prospectively.

The Courts are generally agreed that as to dissenting preferred stockholders, and in the absence of circumstances showing acquiescence or estoppel on the part of such stockholders, the corporation may not, even under such statutes, destroy the right of preferred stockholders to preferred dividends already accrued and in arrears.

Keller v. Wilson, (1936 Dela.) 190 Atl. 115;

Consolidated v. Johnson, (1937 Dela.) 197 Atl. 489;

Romer v. Porcelain, (1938 Dela.) 2 Atl. (2nd) 75;
Carbide v. Dayton, (1939 Ohio) 22 N. E. (2nd) 281;
Roberts v. Roberts, (1939 N. Y.) 77 N. E. 13;
Weidersum v. Atlantic, (1941 N. Y.) 25 N. Y. S.
 (2nd) 496;
Johnson v. Lamprecht, (1937 Ohio) 15 N. E. (2nd) 127.

As support for the contrary view there is sometimes cited the case of *Federal v. Havender* (Dela.) 11 Atl. (2nd) 331; but in that case the merged statute in the form construed as exclusive had been enacted many years prior to the formation of the merged corporation. Obviously, such a case can have no application to our case in which the amended statute was not enacted until three years after the formation of the merged corporation.

Shanik v. White, 19 Atl. (2nd) p. 831, the latest Delaware case, expressly approved the *Keller* case, *supra* (at p. 835) as follows:

"In the *Keller* case in particular there is an elaborate discussion of the rights incident to accumulated dividends on preferred stock, and this court held that such accumulation could not be destroyed without the consent of the holder, nor the holder compelled to exchange such accumulation of arrearage into common stock. With this holding we are now in accord, and nothing herein can reasonably be construed to be otherwise.

"*Federal* * * * *v. Havender* * * * when properly understood was in no way in conflict with the foregoing cases." (*Keller* case. *Consolidated v. Johnson*, 197 Atl. 489.)

As construed by the decision in the case at bar, the amended statute will inevitably permit and practically invite unconscionable oppression of minority stockholders by dominant majority interests, especially where that

majority interest is closely held by one group as in the case at bar.

It is well known that the cash value or market value of preferred stock depends principally upon dividends. Unless dividends are paid with a fair degree of regularity, the market value (which largely influences the cash value) inevitably is depressed to levels far below the true worth of the stock. The payment or non-payment of dividends is largely controlled by the Board of Directors and the dominant majority of stockholders naturally controls the Board and thereby controls the cash value of the stock through payment or non-payment of dividends.

Under the holding of the Virginia court, any dominant majority, by its control of corporate dividends, can at any time, arbitrarily and artificially depress the market value and thus the "*fair cash value*" of the stock; can then vote through and consummate a merger, on any terms this majority sees fit, and can then force minority dissenting stockholders either to accept less desirable exchange stock in a new corporation or be content with the artificially depressed cash value of their stock; and thus be, with the blessing of the law, defrauded of the difference between this depressed "*fair cash value*" and the par value with accrued dividends, to which their charter contract rights justly entitle them.

The case at bar furnishes an excellent example of unconscionable oppression by a single dominant majority interest. As the record will show, although Distributing had made substantial and increasing net profits for a number of years prior to the merger, nevertheless no dividends had been paid for twelve years. Consequently, the market value of the stock had been depressed to less than \$35 per share; and this in spite of a book value of \$125 per share, and a contract value of \$184 per share.

Eloquent proof of how unjustly and artificially this value had been depressed is conclusively shown by what occurred promptly after the merger had been consummated.

With no new assets and under practically the same management and with no general economic changes intervening, the merged corporation in less than six months after the merger paid off approximately a Million Dollars of bonded indebtedness and paid dividends at 5% on its new preferred stock. This was followed up in the following year by the payment of additional dividends, by the retirement of nearly a Million Dollars additional bonded indebtedness, and by the redemption-exchange or retirement of all Class A preference stock (which had been given to assenting stockholders of the old corporation) in an amount aggregating more than Three Million Dollars. Within less than six months after the merger the stock market value of the corporation's securities had nearly trebled.

At the time of the decision of the Virginia court in the case at bar (a little over two years subsequent to the merger), there had been paid out in dividends, retirement of bonded indebtedness and retirement of Class A preference stock more than Five Million Dollars, and the market value of Pittston had increased over 800%. And this occurred during a period when the general average of increase in market value of industrial stock had been only 41%.

The financial chart filed with the Petition for Re-hearing (R. 166) graphically shows how Pittston has been unjustly enriched as a result of the merger it forced upon petitioners and other dissenting stockholders. In spite of all of this unjust enrichment, Pittston still seeks to restrict petitioners to \$55 per share, on the basis of "fair cash value," and to deprive them of their vested contractual rights amounting to \$184 per share.

Conclusion

It is respectfully submitted that the Virginia Merger Statute, as amended in 1922 and as recently construed by the Supreme Court of Appeals of Virginia, unconstitutionally impairs the obligations of the contract between your petitioners and their corporation, Distributing (which has been acquired through merger by Pittston); undertakes to substitute something entirely different and inadequate in place of the contract; abolishes the pre-existing remedy for enforcement of the contract, and destroys the contractual rights which had their inception when petitioners' corporation, Distributing, was chartered three years prior to passage of the amended statute. The Supreme Court of Appeals of Virginia, having had its attention invited to the impairment of your petitioners' constitutional rights as aforesaid, has denied appropriate protection to your petitioners. Accordingly, the decision of said Court in this case should be reviewed and reversed.

Respectfully,

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Of Counsel for Petitioners.

January 25, 1936.

JOHN J. WICKER, JR., *of Richmond, Va.;*
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CHARLES ELMORE CRUMP
CLERK

Supreme Court of the United States

October Term 1945

No. 788

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN LASHER, PEARL
LASHER, E. FRANK O'HARA, SAMUEL BLOOM, ABRAHAM
LINDNER, ELLA LINDNER, SUNNE MILLER, GENIA BERK,
CHARLES GILBERT, DOROTHY LEE, HARVEY LEE, HOWARD N.
STACK and MAX W. WINN,

Petitioners,

against

UNITED STATES DISTRIBUTING CORPORATION,
THE PITTSTON COMPANY, *et als.*,

Respondents.

BRIEF OF RESPONDENT THE PITTSTON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CER- TIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

R. GRAYSON DASHIELL,
WILLIAM W. CRUMP,
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Attorneys for Respondents.

DONOVAN LEISURE NEWTON & LUMBARD,
of Counsel.



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The Opinions Below

The Law and Equity Court of the City of Richmond did not write an opinion. The opinion of the Supreme Court of Appeals of Virginia has been reported at 184 Va. 134, 34 S. E. (2d) 244.

Preliminary Statement

This brief is submitted by respondent, The Pittston Company, hereinafter called "Pittston," in opposition to the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia of Maurice D. Adams and other preferred stockholders of United States Distributing Corporation, hereinafter called "Distributing," who dissented to a merger of Distributing and Pittston.

The basis of the Bill of Complaint, filed by petitioners in the state court, is that they are entitled to a money decree in an amount equal to the par value of their stock,¹ plus accrued dividends (\$184 per share) (R. 72-84). This claim is founded on the language in the stock certificates which provides that in case of liquidation or dissolution, the assets of the corporation shall first be applied toward paying holders of the preferred stock an amount equal to par plus accrued dividends (R. 74).

The Supreme Court of Appeals of Virginia dismissed the Bill of Complaint and held that under the appraisal statute, Section 3822a (formerly part of Section 3822) of the Virginia Code, petitioners were limited to a proceeding thereunder to secure the fair cash value of their stock.

Petitioners seek certiorari on the ground that the remedy under the Virginia appraisal statute, until it was amended in 1922, was not exclusive, but gave petitioners

¹ United States Distributing Corporation 7% cumulative convertible preferred stock of a par value of \$100 per share.

the right to enforce their contractual rights to recover par plus accrued dividends in the event of a dissolution, that the 1922 amendment, which made appraisal the exclusive remedy, destroyed "the obligation of the contract whereby petitioners were entitled to demand and receive out of the assets of their corporation—upon its liquidation or dissolution or distribution of its assets—the par value of their preferred stock plus accrued cumulative dividends thereon;" and that therefore the statute is repugnant to Article 1, Section 10 of the Constitution of the United States (Pet. 23).

Thus, petitioners now contend that the amendment to the appraisal statute in 1922, which made appraisal the exclusive remedy, destroyed their pre-existing contractual rights. That is the whole basis for the petition. That is the sole ground on which their constitutional argument rests. But the record does not show when the preferred stock was issued. Nowhere in the record is there a suggestion that any asserted contractual rights of the petitioners existed prior to the 1922 amendment of the appraisal statute.² Thus the whole basis for their petition

² Since petitioners' present position is now taken for the first time, respondent feels that it should advise this Court that the preferred stock was not in fact authorized or issued until after 1922.

Although Distributing was chartered in 1919, it issued no preferred stock prior to 1924. Moody's Rating Books, Industrial Investments, 1923, at page 1437.

The first issue of preferred stock was in January, 1924. Moody's Analyses of Investments, Industrial Securities, 1924, at page 1614.

Petitioners' preferred stock was issued in 1927, when one share of old preferred stock was exchanged for 1.6 of new preferred and 6 shares of old common, and one share of old common was exchanged for 4/10 of a share of new preferred and 1-1/2 shares of new common. Moody's Manual of Investments, Industrials, 1927, at page 2658.

falls. For this reason and others hereinafter enumerated no question is raised which requires or deserves review by this Court.

Summary of the Argument

POINT I. The federal question sought to be reviewed was not properly raised in the Virginia courts.

POINT II. The case does not present a substantial federal question.

POINT III. The decision of the Supreme Court of Appeals of Virginia rests upon a state ground which independently and adequately supports the decree.

Argument

POINT I

The federal question sought to be reviewed was not properly raised in the Virginia courts.

Where, as in the instant case, a state court does not pass on the federal question sought to be reviewed, it must affirmatively appear that the question was advanced in the state court at the earliest opportunity.

Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States," Sec. 60 p. 107, Sec. 73 p. 124 [1936 Ed.].

Petitioners' assertion that the appraisal statute would be unconstitutional, if construed to provide for appraisal as the exclusive remedy, was first made in summary fashion in their brief in support of their petition to the Supreme

Court of Appeals of Virginia (R. 62-63; Pet. 5). No reference was made to the United States Constitution, and since the Virginia Constitution,³ like that of the United States, provides that no law shall be passed "impairing the obligation of contracts," petitioners' assertion of unconstitutionality is deemed to refer solely to the Constitution of Virginia.

Bowe v. Scott, 233 U. S. 658, 664, 665; 34 S. Ct. 769; 58 L. Ed. 1141 (1914).

In *Gibbes v. Zimmerman*, 290 U. S. 326, 328; 54 S. Ct. 140; 78 L. Ed. 342 (1933) this Court said:

"... The appellant, who was plaintiff in the suit, asserts that the Act impairs the obligation of contract, in violation of the Constitution of the United States. We cannot consider this contention, since in his pleading the appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to §10, of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section."

Prior to filing their application for rehearing petitioners did not raise the federal question sought to be reviewed with sufficient particularity and definiteness, and fall far short of the "Clear Intendment Rule" enunciated in *Bryant v. Zimmerman*, 278 U. S. 63; 49 S. Ct. 61; 73 L. Ed. 184 (1928), upon which they rely (Pet. 7).

The federal question was first raised with sufficient definiteness in the petition for rehearing (R. 131, 136, 143-145; Pet. 6-7). It is a well established rule of this Court

³ Article IV, Sec. 58 of the Constitution of Virginia.

that federal questions first presented in a petition for rehearing are not timely unless the state court entertains the petition and expressly passes on them.

Hernon v. Georgia, 295 U. S. 441, 443; 55 S. Ct. 794; 79 L. Ed. 1530 (1935).

Godchaux Co. v. Estopinal, 251 U. S. 179; 40 S. Ct. 116; 64 L. Ed. 213 (1919).

Since the federal question was not brought into the case by the decision of the Supreme Court of Virginia, and since that decision could reasonably have been anticipated by petitioners, and since they had every opportunity to raise the federal question in the lower court, they may not rely on the "Surprise Cases" (Pet. 7).

POINT II

The case does not present a substantial federal question.

As appears in The Preliminary Statement (*supra*, p. 3), there is nothing in the record even to suggest that petitioners had any contractual rights which could have been impaired by the 1922 amendment to the appraisal statute. Thus there is no basis for petitioners' claim that that amendment destroyed a contractual obligation to them embodied in the Distributing charter.

Even under the statute before it was amended petitioners could not obtain what they seek, a money decree for the par value of their stock plus accrued dividends (\$184 per share). *Winfree v. Riverside*, 113 Va. 717, 75 S. E. 309 (1912), was the only case which considered the

Virginia appraisal statute before the 1922 amendment. That case held only that stockholders dissenting from a merger were not limited to the appraisal procedure outlined in the statute, but were permitted to bring suit in an equity court to have the "actual value" of their stock ascertained. It did not suggest that "actual value" meant par plus accrued dividends.

The Supreme Court of Appeals of Virginia correctly held that the merger did not constitute a dissolution of Distributing, that the merger continued the existence of both corporations in the merged corporation, and that therefore the provisions relied upon by petitioners were not made operative. Its conclusions are fully supported by the authorities it cited (R. 126) and by the recent opinion of this Court in *Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624; 89 L. Ed. 460; 65 S. Ct. 483 (1945).

POINT III

The decision of the Supreme Court of Appeals of Virginia rests upon a state ground which independently and adequately supports the decree.

Petitioners claim that they are entitled to a money decree in the amount of par plus accrued dividends because the stock certificates and the amended charter of Distributing provided for such payment upon dissolution. The Supreme Court of Appeals of Virginia held that under its statutes and decisions there was no dissolution of Distributing within the meaning of the provisions of the stock certificates and the amended charter (R. 125-126). The decree is therefore based upon a non-federal ground, adequate to support it. If petitioners had no vested contrac-

tual right to recover par plus accrued dividends, no such contractual right could be impaired by the appraisal statute.

CONCLUSION

It is respectfully submitted that there is no reason for this Court to review the determination of the Supreme Court of Appeals of Virginia, and that, accordingly, the petition herein should be denied, with costs.

Respectfully submitted,

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